

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA,) Case No. CR 12-00119-SI (LB)
12 Plaintiff,) [Re: ECF Nos. 537, 541, 567, 589, 590]
13 v.)
14 JOSEPH ORTIZ, et al.,)
15 Defendants.)

)

AMENDMENT

18 The first two paragraphs in section II, Subpoenas to South San Francisco Police Department,
19 are amended slightly to clarify that Mr. Ortiz opposed the motion to dismiss and to eliminate the
20 suggestion that the government had not seen the subpoena at issue.

INTRODUCTION

22 There are two discovery issues: (I) the California Department of Corrections and
23 Rehabilitation's (CDCR'S) motions to quash Mr. Ortiz's subpoenas for central files and other
24 inmate information; and (II) the United States' motion to quash Mr. Ortiz's subpoena for South
25 San Francisco police records. The court held a hearing on April 11, 2013 and denies the motions.

26 The court does not file this order under seal because there were public-record references to the
27 subpoenas, some motions were filed as part of the public record, and the court need not and does
28 not refer to confidential information in this order. At Mr. Ortiz's request, the court sealed the

AMENDED ORDER (CR 12-00119-SI (LB))

1 hearing to allow discussion of confidential matters.

ANALYSIS

I. SUBPOENAS TO CDCR

4 On February 7, 2013, the district court granted Mr. Ortiz's motion and issued two subpoenas to
5 the CDCR for (A) Mr. Ortiz's central file and other information and (B) another inmate's central
6 file and other information. *See* ECF No. 513 (under seal). On February 22, 2013, the CDCR
7 moved in two public-record filings to quash the subpoenas, raising its ordinary sovereign
8 immunity and privilege challenges and also attaching its standard protective orders. *See* ECF
9 Nos. 537-544. On March 1, 2013, Mr. Ortiz opposed the motions. *See* ECF No. 551. The court
10 set the hearing first for March 28, 2013, and then, based on different scheduling issues, for April
11 11, 2013, at 10:00 a.m. *See* 3/26/13 Docket Entry. 10 a.m. was a staggered start time on the
12 regular 9:30 a.m. criminal calendar to reduce attorney wait time and inconvenience to the United
13 States Marshals Service. On April 11, 2013, at 9:39 a.m., while the undersigned was already on
14 the bench, the United States filed a two-line joinder to the CDCR's motions. *See* ECF No. 590
15 and related receipt. The joinder contained no legal argument.

16 At the April 11 hearing, the CDCR clarified that it filed the motion to quash essentially as a
17 mechanism to ensure that the materials were produced pursuant to its standard protective orders.
18 Mr. Ortiz had no objection to the standard protective orders.

19 At the hearing, the United States withdrew its objection to the production to Mr. Ortiz of his
20 own files and records. (As the court observed, production of this information is standard.) As to
21 production of the other inmate's file and records, the government reiterated that it objected to
22 production of the information and also asked that if the court were to authorize the production, it
23 be made subject to the stipulated protective order pending before the district court, which the
24 court presumes is the order pending at ECF No. 553.

25 Because the practical import of the CDCR's motion is that it does not object to production of
26 information so long as it is produced pursuant to its protective orders, the court denies the
27 CDCR's motions to quash. The court will sign and issue the orders separately.

As to the government's objection to the production of the other inmate's records, the

1 information is produced in criminal litigation pursuant to protective orders. On this record, it
2 appears to meet the four-part test for production of evidence pursuant to a Rule 17(c) subpoena:
3 (1) the documents or items sought are evidentiary and relevant; (2) they are not otherwise
4 procurable reasonably in advance of trial by exercise of due diligence; (3) the party cannot
5 properly prepare for trial without production and inspection in advance; and (4) the application is
6 made in good faith and is not a general fishing expedition. *See United States v. Nixon*, 418 U.S.
7 683, 700 (1974). Again, the government made no legal argument at all, and the CDCR's claims
8 of immunity and privilege do not apply to the United States. But as the government requests, the
9 court orders production of the other inmate's records to Mr. Ortiz subject to the terms of the
10 heightened protective order.

11 The United States noted that it might seek to appeal the order as to the other inmate's
12 information and asked for a stay of its obligations until Wednesday, April 17, 2013. The court
13 grants that stay. Any legal argument needs to be addressed first to the undersigned (and not the
14 district court) and should address standing, particularly because the CDCR's immunity-and-
15 privileges arguments do not apply to the United States, which made no other legal argument.

16 **II. SUBPOENAS TO SOUTH SAN FRANCISCO POLICE DEPARTMENT**

17 On February 13, 2013, the district court granted Mr. Ortiz's motion for specified records from
18 the South San Francisco Police Department. *See* ECF No. 525 (under seal). The government
19 moved to quash the subpoena. *See* ECF No. 567. Mr. Ortiz opposed the motion in a sealed
20 opposition submitted on March 21, 2013 and filed (due to a delay in the sealing order) on March
21 26, 2013. On April 11, 2013, at 9:35 a.m. (again, while the undersigned was already on the
22 bench), the government filed the City of San Francisco's one-line joinder. *See* ECF No. 589.

23 At the hearing, the court discussed with the government how the subpoena seeks disclosure of
24 police reports that have nothing to do with the witness safety issues that the government is
25 concerned about and that are relevant only to mitigation (and not the charged conduct). Also, on
26 this record, the court concludes that the subpoena request satisfies the *Nixon* four-part test. *See*
27 418 U.S. at 700. The undersigned can see no reason why the government would care about the
28 production of the information except if it has to do with witness safety. As the Department of

1 Justice said in the Ogden memo, “[p]rosecutors are also encouraged to provide discovery broader
 2 and more comprehensive than the discovery obligations:”

3 A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad
 4 and early discovery often promotes the truth-seeking mission of the Department and fosters
 5 a speedy resolution of many cases. It also provides a margin of error in case the
 6 prosecutor’s good faith determination of the scope of appropriate discovery is in error.
 7 Prosecutors are encouraged to provide broad and early discovery consistent with any
 8 countervailing considerations. . . including but not limited to: protecting victims and
 9 witnesses from harassment or intimidation; protecting the privacy interests of witnesses;
 10 protecting privileged information; protecting the integrity of ongoing investigations;
 11 protecting the trial from efforts at obstruction; protecting national security interests;
 12 investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery
 13 by defendants; any applicable legal or evidentiary privileges; and other strategic
 14 considerations that enhance the likelihood of achieving a just result in a particular case.

15 David W. Ogden, Deputy Attorney General, *Memorandum For Department Prosecutors:*
 16 *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), at 9-10.

17 The only possible issue here is witness safety, and even that is unlikely, given the time period
 18 for the requested reports and the people implicated in them. Nonetheless, to address that concern,
 19 the court proposed, and the defense did not object to, a gate-keeping function by the government
 20 whereby it could review the reports first and then produce them to the defense. The government
 21 did not agree to this process and asked that the court stay its obligations until Wednesday, April
 22 17, 2013.

23 The court denies the government’s motion to quash. On April 11, 2013, the court agreed to
 24 stay the government’s obligations (but not South San Francisco’s) until April 17, 2013. South
 25 San Francisco shall produce the requested reports to the government immediately and no later
 26 than 14 days from the date of the court’s order on April 11, 2013 absent further order of the court
 27 for good cause. Within two days of receipt of the reports, and again absent a further court order
 28 granting an extension for good cause, the government shall produce the reports to either (A)
 counsel for Mr. Ortiz or (B) the court for an in camera inspection of any witness safety issues.
 For category B material produced to the court, the government must produce a log or other
 similar device (even highlighting) to allow identification of the witness safety issues. For
 category B material, the government may elect to produce the material to counsel for Mr. Ortiz
 pursuant to the heightened protective order.

1 These records are produced based on Mr. Ortiz's subpoena, and there should be no delay
2 regarding processing. The parties may designate production through the discovery coordinator to
3 expedite production issues such as Bates labeling.

CONCLUSION

5 The court denies CDCR's two motions to quash, the United States' joinder in it, the United
6 States' motion to quash, and South San Francisco's joinder in it. This disposes of ECF Nos.
7 537, 541, 567, 589, and 590.

8 || IT IS SO ORDERED.

9 | Dated: April 17, 2013

L18C

LAUREL BEELER
United States Magistrate Judge